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No. 94-900

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

BAYOU DES FAMILLES
DEVELOPMENT CORPORATION,
COAST QUALITY CONSTRUCTION CORPORATION,
and BETTY JANE PERRIN, WIFE OF/AND
RONALD J. ISAAC,

*Petitioners,*

*v.*

WEST JEFFERSON LEVEE DISTRICT,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF LOUISIANA

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## COUNTERSTATEMENT OF THE QUESTION PRESENTED

**Do the Fifth and/or Tenth Amendments to the U.S. Constitution make a state agency expropriating property for a public use liable to a landowner for the devaluation of fair market value of his property, caused by federal agencies implementing federal regulations and enforcing federal laws, which occurred long before, and which was unrelated to, the taking?**

## TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE QUESTION PRESENTED . . . . . i

TABLE OF CONTENTS . . . . . ii

TABLE OF AUTHORITIES . . . . . ii

STATUTORY PROVISIONS AND RULES OF THE SUPREME COURT INVOLVED . . . . . 2

STATEMENT OF THE CASE . . . . . 4

SUMMARY OF THE ARGUMENT . . . . . 9

ARGUMENT:

I. This Case Is Not Appropriate For The Court's Exercise Of Its Discretionary Jurisdiction . . . . . 9

II. This Case Does Not Present A Substantial Federal Question Under Either The Fifth Or Tenth Amendment To The U.S. Constitution . . . . . 10

CONCLUSION . . . . . 18

## TABLE OF AUTHORITIES

*Constitutional Provisions:*

Fifth Amendment to the U.S. Constitution . . . . . 10, 13, 16

Tenth Amendment to the U.S. Constitution . . . . . 10, 13

*Statutes:*

16 U.S.C. § 230, et seq. . . . . 5

16 U.S.C. § 230 a (b) . . . . . 5

33 U.S.C. § 403 . . . . . 4

33 U.S.C. § 1251, et seq. . . . . 4

28 U.S.C. § 1257(a) . . . . . 2, 10

28 U.S.C. § 1491 . . . . . 6

*Court Rules:*

S.Ct. R. 10 . . . . . 2

S.Ct. R. 14.1(h) . . . . . 3, 10

*Court Rules, continued:* Page

S.Ct. R. 15.1 . . . . . 3

*Cases:*

*Bayou des Familles Dev. Corp., Coast Quality Construction Corporation, and Betty Jane Perrin, wife/and Ronald J. Isaac v. The United States of America*, No. 91-13151 (U.S. Cl. Ct., filed July 25, 1991) . . . . . 13, 17

*Bayou des Familles Dev. Corp. v. United States Corps. of Engineers, et al.*, 541 F.Supp. 1025 (E.D. La. 1982); *aff'd* (without opinion) 709 F.2d 713 (5th Cir. 1983); cert. denied, 465 U.S. 1065, 104 S.Ct. 1513, 79 L.Ed.2d 739 (1984). . . . . 6, 13

*Florida Rock Industries v. United States (Florida Rock IV)*, 18 F.3rd 1560 (Fed. Cir. 1994) . . . . . 16

*Riggins v. Nevada*, 112 S.Ct. 1810, ___U.S. ___, 118 L.Ed.2d 479 (1992). . . . . 9

*United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985). . . . . 11

*West Jefferson Levee District v. Bayou des Familles Development Corporation*, c/w *West Jefferson Levee District v. Coast Quality Construction Corporation*, c/w *West Jefferson Levee District vs. Betty Jane Perrin, wife of/and Ronald J. Isaac*, 93-1718 (La. 5/23/94), 640 So.2d 1258 . . . . 4, 11, 12, 14, 15

*Treatises:*

*Wright, Miller, Cooper & Gressman*, Federal Practice and Procedure: Jurisdiction (Vol. 16) §4022 . . . . . 10

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, West Jefferson Levee District, through its counsel of record, received the Petition for Writ of Certiorari on November 13, 1994, and filed this brief in opposition within the thirty (30) day period set forth in Rule 15.2 of the Rules of the Supreme Court. Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari filed by petitioners.

## STATUTORY PROVISIONS AND RULES OF THE SUPREME COURT INVOLVED

Petitioners seek to invoke the jurisdiction of this Court to review a final judgment of the Louisiana Supreme Court, the highest court of the state, pursuant to the provisions of 28 U.S.C. §1257(a) which provides as follows:

> Final judgments or decress rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Rule 10 of the Rules of the Supreme Court providing for considerations governing review on writ of certiorari provides in pertinent part as follows:

> .1 A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) . . . .
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals.

> (c) When a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Rule 14 of the Rules of the Supreme Court requires:

> .1 The petition for a writ of certiorari shall contain, in the order here indicated:
>
> . . .
>
> (h) If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal question sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari . . . .

Pursuant to Rule 15.1 of the Rules of the Supreme Court, "the brief in opposition should address any perceived misstatements of facts or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted."

## STATEMENT OF THE CASE

The decision and opinion of the Louisiana Supreme Court, 93-1718 (La. 5/23/94), 640 So.2d 1258, Appendix A, Appendix Vol. 1 to petition for writ of certiorari, accurately and thoroughly sets forth the facts and law of the case. Respondent sets forth the following salient facts of this case because of certain inaccuracies and misleading statements in the petition for writ of certiorari.

In August 1972, petitioners (sometimes hereinafter "landowners") acquired the property which is the subject of this case. On October 18, 1972, Congress passed the Federal Water Pollution Control Act Amendments (FWPCA). 33 U.S.C. §1251, *et seq.* The amendments, renamed the Clean Water Act in 1977, gave the U.S. Corps of Engineers ("Corps") the regulatory power to prohibit the discharge of pollutants into navigable waters except as authorized by permit, commonly known as the "§404 permit." Likewise, under the Rivers and Harbors Appropriation Act of 1899 (RHA), 33 U.S.C. §403, the Corps also has the regulatory power to prohibit any activity affecting any navigable waterway unless authorized by a "§10 permit" issued by the Corps. Under the provisions of these acts and the regulations promulgated thereunder, the vast majority of the landowners' property at issue here was classified as tidally influenced wetlands. These federal laws and regulations prohibited the landowners from developing their wetlands without permits from the Corps.

In 1973, the landowners began to construct a levee along the westerly edge of their property which was needed in order to allow it to be ditched and drained. They also began the construction of other infrastructures necessary to allow the property to be utilized for single family residential subdivision housing, including

sewerage and drainage pump stations and a potable water line. By 1974, the construction and installation of the infrastructures including the levee were almost complete. In January 1974, however, the Corps issued a cease and desist order to the landowners because they had not obtained the necessary federal permits from the Corps prior to commencement of the work on the property which was tidally influenced wetlands requiring permits from the Corps.

In 1975, the landowners filed an application with the Corps for after-the-fact permits to authorize the work and to permit them to complete the infrastructure improvements and to continue developing the property for residential housing.

In November 1978, Congress authorized the creation of the Jean Lafitte National Park by public law 95-625, 16 U.S.C. §230, *et seq.* Pursuant to that law, the U.S. Department of the Interior ("DOI") included the landowners' wetlands property within the park protection zone ("PPZ"). The PPZ serves as a buffer area between the Corps area of the park and adjacent developments. 16 U.S.C. §230 a (b).

In September 1979, the Corps denied the landowners' permit application to construct a levee and build their planned residential subdivision on the wetlands portion of their property. The landowners sued the Corps, the DOI and the United States of America in federal court in 1979. The suit sought to enjoin the Corps' denial of its permit application, to enjoin the Corps' recommendation of a levee alignment other than one following the alignment which would enclose its property for development as a residential subdivision and to enjoin the DOI from issuing regulations covering the PPZ. The district court upheld the actions of the Corps and

DOI and denied all of the landowners' claims for relief. The court concluded, "Plaintiff's exclusive remedy for claims of uncompensated takings, through delay or otherwise, if any are present in this case, rests with the court of claims under the Tucker Act, 28 U.S.C. §1491."[1]

In June 1981, the Parish of Jefferson filed an application with the Corps for permits to construct a locally funded hurricane protection levee on the West Bank of Jefferson Parish along an alignment which was eventually designated as alternate alignment D in the Corps' detailed study and review conducted in the permit application process. The parish needed permits from the Corps because the parish proposed to build the levee in wetlands. The Corps also studied other possible alignments of the proposed levee which were designated as alternate alignment A through G in the permit application process. Alternative alignment D, as it affected the landowners' property, was in the same location as was the levee which the landowners had begun constructing back in the early 1970's and for which its after-the-fact permit had been denied by the Corps in 1979. It would have provided hurricane and flood protection to the majority of the landowners' property which had no such protection. At the conclusion of the study and permitting process in June 1984, the Corps denied the Parish's request for permits for the alignment designated as alternative D in the study. However, simultaneously with the denial of the parish's application to construct a levee along alternative alignment D, the Corps offered the parish a permit for

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[1] *Bayou Des Familles Dev. Corp. v. United States Corps of Engineers, et al.*, 541 F.Supp. 1025, 1042, (E.D. La. 1982); *aff'd* (without opinion) 709 F.2d 713 (5th Cir. 1983); cert. denied, 465 U.S. 1065, 104 S.Ct. 1413, 79 L.Ed.2d 739 (1984).

the construction of the levee along an alignment which the Corps designated as modified alternative alignment E. This alignment did not provide flood protection to the majority of the remainder of the landowners' property which was also unprotected prior to the taking.

It wasn't until January 1986 that the parish accepted the Corps' June 1984 offer of permits for modified alignment E and, with the approval of the Corps, assigned the permits to the West Jefferson Levee District. It was pursuant to that permitted alignment for modified alignment E that the West Jefferson Levee District expropriated the right of way over the landowners' property in this case for the construction of a portion of the hurricane protection levee project. The permit granted for only the modified E alignment effectively prohibited, because it did not allow, the construction of the project levee anywhere else on the landowners' property.

Prior to the expropriation, there was no levee on the landowners' property which gave it any protection from tidal flows and surges. Alignment D for which the parish's permit application was denied by the Corps in 1984, although it would have provided protection from hurricane tidal surges, would not have provided protection from the normal ebb and flow of tides. The consideration by the Corps of alignment D included several flood gates in the levee in the area of the landowners' property which would allow for the normal, albeit somewhat restricted, ebb and flow of tides into and out of the property. Consequently, even if the Corps had granted a permit to the parish for alignment D, not only would the landowners' wetlands property continue to be wetlands, but it would have continued to be tidally influenced wetlands. It still would have

required permits from the Corps in order for it to be developed and thereby obtain any practical economic value.

It is uncontested that unless and until the landowners obtained the necessary permits, the wetlands portion of their property's highest and best use, its only legally permissible use in its natural state before the taking, would be for hunting, fishing and related recreational purposes. No construction on or improvements to the wetlands portion of their property of any sort could be done which would be necessary to place the property in commerce or to give it any practical economic value other than for the limited purposes mentioned.

The landowners made no other application to the Corps for permits to develop their property for residential or any other purpose since the Corps' denial of their permits in 1979. The landowners received no offers to purchase their property. From and after the Corps' cease and desist order in 1974 up to and including the time of trial of these consolidated expropriation suits in 1991, the landowners' property was fallow.

There was no evidence that the landowners' wetlands property was legally developable immediately prior to the taking in 1989, or within the not too distant future thereafter, or at any time after the Corps issued the cease and desist order to the landowners in 1974. The landowners merely contended and argued that the Corps should have granted their permits to build their own levee and develop their property in 1979 and therefore its valuation should be based on a highest and best use as a residential subdivision. The landowners neither offered nor argued any other use or value for their property other than as for residential subdivision purposes.

In accordance with the testimony of all of the real estate experts, including the landowners', the Louisiana Supreme Court found that the wetlands' highest and best use at the time of the taking and for the reasonably foreseeable future, was for hunting, fishing and related recreational purposes, and, as such, its fair market value was $550 per acre which was the value paid by the Levee District at the time of the expropriation.

## SUMMARY OF THE ARGUMENT

I. Petitioners failed to raise and urge their tendered federal questions in the State courts.

II. There is no substantial federal question involved to justify the grant of a writ of certiorari here.

III. In factual situations like that presented in this case, the decision of the Louisiana Supreme Court is in accordance with the body of law relating to just compensation to landowners for private property taken for public use. Petitioners fail to carry their burden of proof to show that they did not receive just compensation for their property taken for public use.

## ARGUMENT

### I.

### THIS CASE IS NOT APPROPRIATE FOR THE COURT'S EXERCISE OF ITS DISCRETIONARY JURISDICTION.

The threshold procedural requirement for Supreme Court review is that the tendered federal questions have been presented to the state courts. The Supreme Court will not consider questions that are raised for the first time in seeking review of completed state proceedings. *Riggins v. Nevada*, 112 S.Ct. 1810, 1814, ___ U.S. ___,

118 L.Ed.2d 479 (1992). This requirement is most immediately founded on the statutory provision for review of federal matters that have been "drawn in question" or "specially set up or claimed." 28 U.S.C. §1257(a). Wright, Miller, Cooper & Gressman, Federal Practice and Procedure: Jurisdiction (Vol. 16) §4022, p. 696. Because the requirement is jurisdictional, the party seeking review must carry the burden of proving that the federal questions were represented to the state courts. *Id.*, p. 697.

The landowners' petition fails to show that the tendered federal questions in this case (that the decision of the Louisiana Supreme Court violates petitioners' rights under the Fifth and Tenth Amendments of the U.S. Constitution) were "drawn in question" or "specially set up or claimed" by them in the Louisiana Supreme Court or the lower state courts as required by 28 U.S.C. §1257(a). The petition fails to show that the alleged federal question "was timely and properly raised [in the State courts] so as to give this Court jurisdiction to review the judgment on a writ of certiorari" pursuant to the requirements of Rule 14.1(h) of the Rules of this Court.

## II.

## THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION UNDER EITHER THE FIFTH OR TENTH AMENDMENT TO THE U.S. CONSTITUTION.

This case presents no issue appropriate for the Court's exercise of its discretionary jurisdiction. There is no substantial federal question involved to justify the grant of a writ of certiorari here. The decision of the Louisiana Supreme Court is in accordance with the facts and with a body of law relating to just compensation to landown-

ers for private property taken for public use in situations like that presented in this case.

Petitioners argue that the Louisiana Supreme Court found that the Corps 1979 denial of petitioners' §404 permit application effected a taking of petitioners' property and that such a finding conflicts primarily with this Court's decision in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985). Petition for Writ, pp. 13-17.

The Louisiana Supreme Court decision made no such finding. The Louisiana Supreme Court summarized its findings as follows:

> The record unequivocally shows BDF's permit application was denied by the Corps in 1979 because of public and political pressure on the Corps to preserve the landowners' wetlands property as undeveloped and unpermitted wetlands because of its inclusion in the park protection zone of Jean Lafitte Park and because BDF's permit application did not meet the criteria at that time for the granting of a permit. Furthermore, the record also reveals that even if the hurricane levee project was not in existence and BDF had continued to reapply for permits up until the expropriation suits were filed, the permit application would have continually been denied due to the land's inclusion in the park protection zone and because of the emerging national policy in favor of preserving wetlands unless development was absolutely necessary. For these reasons unrelated to the hurricane levee project, the wetlands acreage of the property had a nominal value of $550 per acre at the time of the expropriation. The district may not be held liable for this devaluation. The record also shows that for the same reasons, there was and is no reasonable probability

> that in the reasonably near future after the expropriation the landowners would have been able to obtain the necessary permits for developing their land into its highest and best use of residential subdivisions had the project and resultant expropriation not taken place. [Opinion of the Louisiana Supreme Court in this case, 93-1718 at 34, 640 So.2d at 1284, 1285 (p. A-56, 57).]

Furthermore, there is nothing in the decision and opinion of the Louisiana Supreme Court in this case which supports petitioners' contention that the Court found that the Corps' 1979 denial of its permit application was a taking; the Court merely relied upon the undisputed facts of the case and the opinion testimony of all the real estate experts who testified in the case, including the landowners' experts, that based upon the 1979 Corps' denial of the landowners' permit application, and the inclusion of the landowners' wetlands property in the park protection zone that the wetlands property had a fair market value of $500-$550 per acre at the time of the taking and until such time as the landowners would have the necessary permits in hand.

In footnote 54, at the very conclusion of its opinion, the Louisiana Supreme Court acknowledged:

> This Court's only function in this case is to decide the appropriate compensation due the landowners from a political subdivision of the State of Louisiana, namely, the West Jefferson Levee District, which expropriated the landowners' property for the construction of a hurricane protection levee. Louisiana constitutional and statutory provisions, as well as the jurisprudence of this Court, are our guideposts. It goes without saying that it is not for this Court to decide whether the denial of BDF's permit application by the Corps in 1979

> was arbitrary or capricious or whether the Corps was legally obligated to build its own hurricane protection levee along the line of BDF's incomplete levee. Those issues were already decided against the landowners in *Bayou des Familles Dev. Corp. v. United States Corps of Engineers,* 541 F. Supp. 1025 (E.D. La. 1982), aff'd, 709 F.2d 713 (5th Cir. 1983), cert. denied, 465 U.S. 1065; 104 S.Ct. 1413, 79 L.Ed.2d 739 (1984). Nor is there presented for decision by this Court the merit of the landowners' claim against the federal government for any uncompensated regulatory taking resulting from the actions of the Corps of Engineers or the United States Department of the Interior over the past two decades. This matter is pending in the U.S. Claims Court. See *Bayou des Familles Dev. Corp., Coast Quality Construction Corporation, and Betty Jane Perrin, wife of/and Ronald J. Isaac v. The United States of America,* No. 91-13151 (U.S. Cl. Ct., filed July 25, 1991) . . . . .

Petitioners received just compensation from the Levee District for their private property taken for public use based upon its fair market value at the time of the taking. There is no substantial federal question under the Fifth Amendment to the U.S. Constitution based upon the facts of this case. The landowners simply are dissatisfied that the Louisiana Supreme Court did not adopt their convoluted and unprecedented theory.

Respondent fails to follow petitioners' argument that the decision of the Louisiana Supreme Court violates their rights under the Tenth Amendment to the United States Constitution. The landowners argue that "The Louisiana Supreme Court exonerates the Levee District from liability for payment of just compensation on the

grounds that the Corps in effect commandeered the Levee District into taking action to ensure the property would remain undeveloped wetlands for purposes of the park protection zone." (Petition for Writ, p. 16). In support of that statement and the theory that the Louisiana Supreme Court's decision in this case violated the Tenth Amendment, petitioners quote from the decision of the Louisiana Supreme Court that petitioners "have lost the opportunity to develop their land and generate a return on their investment, not because of any action of the West Jefferson Levee District . . . but rather as a result of federal governmental action." (Petition for Writ, p. 18).

Petitioners also claim that "there is no doubt that the Corps, by means of the §404 permitting process, has used the Levee District as an 'implement of regulation' in order to ensure petitioners' property remains undeveloped wetlands for purposes of the park protection zone." (Petition for Writ, p. 20). There is absolutely no support in the opinion of the decision of the Louisiana Supreme Court which could be construed as "treating the Levee District as a mere agent or instrumentality of the federal government and thereby impermissibly exonerating the Levee District" (Petition for Writ, p. 22) from compensating the landowners for the devaluation of their property which resulted from federal agencies acting pursuant to federal laws upheld by federal courts. The Levee District has never denied that it took the landowners' property for public use. Whether or not there was a regulatory taking by the Corps and/or DOI long prior to the Levee District's expropriation of the property in 1989 was not an issue decided by the Louisiana Supreme Court in this case. Neither the Corps nor DOI are parties in this case. The landowners confuse

and attempt to equate the devaluation of their property resulting from the enforcement of federal laws and regulations by federal agencies and the taking of that property by the Levee District and paying the landowners the fair market value of their property, such as it was at the time of the expropriation, as just compensation therefore. The Levee District is responsible for what it took, but only for what it took, and for its fair market value at the time of the taking based upon its highest and best use within the reasonably foreseeable future in accordance with the evidence presented at trial.

On page 22 of their petition for writ, the landowners unabashedly state that under the Local Cooperation Agreement to which they refer the Federal government would retroactively indemnify the Parish for most of the compensation for which the Parish as well as the Corps anticipated would be awarded to petitioners for the taking of petitioners' property as a result of the Levee District's acceptance of the permit for construtions of the levee along alignment E. First, the Local Cooperation Agreement referred to was negotiated and entered into between the Levee District and the Corps, not the Jefferson Parish Council and the Corps. Secondly, as was noted in the decision of the Louisiana Supreme Court in this case, "after the District's acceptance of a permit to build its own locally funded hurricane levee along alignment E and after the District had filed these expropriation suits, the District and the Corps, on December 18, 1990, signed a Local Cooperating [sic] Agreement wherein the Corps agreed to share with the District the costs of constructing a West Bank hurricane protection levee which would be a more extensive levee than the one which the District was seeking to build on

its own." 93-1718 (La. 5/23/94). 640 So.2d 1258, 1268, Appendix A-15, 16. The spin that the landowners attempt to put on the purpose and provisions of the Local Cooperation Agreement is unsupported by the evidence.

Lastly, the landowners cite and rely on *Florida Rock Industries v. United States (Florida Rock IV)*, 18 F.3rd 1560 (Fed. Cir. 1994), in asking this Court to grant certiorari in order to determine whether the fair market value of property with a "highest and best use" as investment property is a proper measure of just compensation under the Takings Clause of the Fifth Amendment. (Petition for Writ, p. 27). Pretermitting whether or not holding property as an investment can constitute a "highest and best use" recognized in the real estate appraisal industry as a "highest and best use" for which property may be considered in determining its fair market value, the issue is whether landowners whose property has been expropriated pursuant to state law for public use are entitled to a re-trial to allow them to present evidence of a newly alleged highest and best use of the property for valuation purposes which they failed to raise and assert at the initial state trial and appellate levels. The landowners are merely seeking another shot at the apple from the Levee District. They are no more entitled to a re-trial of the highest and best use of their property issue as investment property anymore than they would be entitled to a re-trial to attempt to establish any other highest and best use classification of their property.

The landowners were not limited to claiming that the highest and best use of their property in this case was for residential subdivision purposes as they chose to do at the state court trial level through the briefing on the merits and oral argument before the Louisiana Supreme

Court. They could have contended, argued and briefed alternative highest and best uses of their property in their initial pleadings and presentation of evidence in the state trial court. They failed to do so. Petitioners have no procedural nor substantive right to a re-trial to present a theory of valuation and evidence in support thereof which was available to them at the time of trial. Petitioners cite no authority for this contention nor does that contention involve a substantial federal question giving this Court jurisdiction to grant a writ of certiorari. They have another shot at the apple, but it's at the Corps and/or DOI under the Tucker Act in the Court of Claims as they were advised by the United States District Court for the Eastern District of Louisiana in 1982. (See footnote 1). The landowners have fired that shot in *Bayou Des Familles Development Corporation, Coast Quality Construction Corporation, and Betty Jane Perrin, wife of/and Ronald J. Isaac v. The United States of America,* No. 91-13151 (U.S. Ct. Cl. filed July 25, 1991) which is now pending.

## CONCLUSION

There is no substantial federal question present here nor were the alias federal questions tendered in the petition for writ of certiorari timely and properly raised in the state trial and appellate courts. The landowners received the just compensation for the fair market value of their property at the time it was expropriated by the Levee District for public use. Because the case presents no issue appropriate for the Court's review and because the decision of the Louisiana Supreme Court is correct, the Court should deny the landowners' petition for writ of certiorari.

Respectfully submitted,

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